Supreme Court, U.S.
FILED
MAY 22 1995
CLERK

No. 91-1616

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

GEORGE WICKS,
Petitioner,

v.

MISSISSIPPI EMPLOYMENT SERVICE
and HAZEL COOK,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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May 22, 1995

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

14pp

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In the spring of 1992 an Office Manager III position was awarded to James G. Morgan. Petitioner George Wicks had applied for the job, but it was awarded to Mr. Morgan.

Wicks filed an action in the United States District Court for the Northern District of Mississippi against Hazel Cook, a former supervisor, and his employer, the Mississippi State Employment Service (MSES). Wicks alleged that because of his race, he was denied the job and it was awarded to a lesser qualified white person.

In April 1994, Cook filed a Motion to Dismiss or in the alternative, Motion for Summary Judgment based on qualified immunity and moved the court to hold discovery in abeyance pending action on the motion to dismiss.

In support of her motion, Cook filed an affidavit stating that:

(1) She had not been Wicks supervisor since 1990.

(2) She was an Office Manager I and that the Office Manager III position that Wicks applied for was in fact her supervisor and as such she was not consulted on the selection.

(3) The reprimands complained of by Wicks were based on his job performance.

The Magistrate Judge entered an order permitting discovery on the issue of qualified immunity. The District Judge affirmed the Magistrate's order.

Cook appealed the order permitting discovery to the United States Court of Appeals for the Fifth Circuit.

The Fifth Circuit reversed the district court's order permitting discovery and found that:

(1) Wick's allegations fail to suggest how Cook violated his clearly-established first amendment rights.

(2) The complaint discloses no basis for a finding that his charges about poor "write-up" are a matter of public concern and therefore his interest in commenting upon those matters is greater than the defendant's interest in promoting efficiency in delivery of public services.

(3) The allegation that his speech motivated Cook's tortious acts is wholly conclusionary.

(4) Wicks did not allege exactly what he believes Cook did to prevent his promotion.

(5) The complaint appears to be nothing more than an attempt to redress a personal grievance, a claim not generally actionable against a public employer.

(6) Wicks only makes broad and wholly conclusionary allegations that Cook discriminated against him on the basis of race.

(7) Wicks failed to allege any conduct of Cook that could be considered to "violate a clearly established statutory . . . right. *Wicks v. Mississippi State Employment Services,* 41 F.3d 991, 995-996 (5th Cir. 1995).

The Fifth Circuit found that Wicks had failed to meet the threshold pleading requirements for either of his claims and that any discovery is improper. *Id.* at 996.

The Court, on remand, stated that immediate dismissal is not justified and that Wicks should be given an opportunity to plead his case properly before dismissal is considered.

Respondents Mississippi Employment Service and Hazel Cook, respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Fifth Circuit. That opinion is reported at 41 F.3d 991 (5th Cir. 1995).

SUMMARY OF ARGUMENT

The Court of Appeals followed the decisions of this Court regarding discovery when it held that discovery was improper. Wicks failed to allege any conduct of Cook that could be considered to "violate a clearly established statutory right." This Court has repeatedly stated that until the threshold immunity question is resolved, discovery should not be allowed.

Petitioner Wicks takes the position that the Fifth Circuit decision is not consistent with *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. ——, 112 L.Ed.2d 517, 113 S.Ct. 1160 (1993). The law and facts of Wicks' case are not comparable to *Leatherman.* Cook as a state supervisor enjoys qualified immunity in § 1983 actions, while municipalities do not. This is a classic case of comparing apples and oranges and any comparison as to nonconformity is totally without merit. Qualified immunity is an immunity from suit and

as such requires an application quite different from a standard for a municipality in a § 1983 action.

The Fifth Circuit en banc in *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995), while still embracing the requirement that complaints plead more than conclusions, no longer insists that a plaintiff fully anticipate the "qualified immunity" defense in his complaint at the risk of dismissal.

A plaintiff pleading a case of discrimination against a defendant, who enjoys qualified immunity, is not granted a license to ignore the immunity standards. The cases cited by Wicks as unreconcilable with the Fifth Circuit decision do not involve the qualified immunity defense; therefore, are not a correct measure to make a comparison. *Harlow* recognizes the right not to be burdened by litigation until the "conduct complained of" is shown to violate clearly established law, no exception is made for discrimination cases.

This case has been remanded to the district court to allow amendment. The conduct of which Wicks complains can be plead and the substantive rights of both parties will be acknowledged.

The Supreme Court has stated its position on qualified immunity several times in the past and the Circuit Courts should be allowed to work out the minor procedural details before this Court considers the issue again.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH THE SUPREME COURT'S PRECEDENT AND CLOSELY PARALLELS THIS COURT'S DECISION IN *SIEGERT v. GILLEY*, 500 U.S. 226, 114 L.Ed.2d 277, 111 S.Ct. 1789 (1991).

In *Siegert v. Gilley*, 500 U.S. at 231, once again the Supreme Court addressed the proper analytical framework for determining whether a plaintiff's allegations are sufficient to overcome a defendant's defense of qualified immunity when it stated:

> Qualified immunity is a defense that must be pleaded by a defendant official. *Gomez v. Toledo*, 446 U.S. 635, 64 L.Ed.2d 572, 100 S.Ct. 1920 (1980); *Harlow*, 457 U.S. at 815, 73 L.Ed.2d 396, 102 S.Ct. 2727. Once a defendant pleads a defense of qualified immunity, "[o]n summary judgment, the judge appropriately may determine, not only the current applicable law, but whether the law was clearly established at the time an action occurred. . . Until this threshold immunity question is resolved, discovery should not be allowed." *Id.* at 818, 73 L.Ed. 2d 396, 102 S.Ct. 2727.

This Court found in *Siegert*, 500 U.S. at 233 that Siegert not only failed to allege the violation of a constitutional right that was clearly established at the time of Gilley's actions, but he failed to establish the violation of any constitutional right at all. As in *Siegert*, the Circuit Court found that Wicks fails to allege any conduct of Cook that could be considered to "violate a clearly established statutory right."

The Court further stated while discussing why discovery should not be allowed that: "This case demonstrates the desirability of this approach to a claim of immunity." *Siegert, id.* at 233.

There is a remarkable similarity between Petitioner Wicks' case and *Siegert*, with the Fifth Circuit applying the law as outlined by the Supreme Court.

II. THE FIFTH CIRCUIT'S DECISION IS NOT INCONSISTENT WITH *LEATHERMAN v. TARRANT COUNTY NARCOTICS INTELLIGENCE & COORDINATION UNIT*, 507 U.S. ——, 113 S.Ct. 1160, 122, L.Ed.2d 517 (1993).

Wicks urges this court to grant his petition because the Fifth Circuit's heightened pleading rule is inconsistent with *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. ——, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). Petition for Certiorari at 4.

The Fifth Circuit's rule is not contrary to *Leatherman*. As stated in the Petition for Certiorari at 2, this is an action against the Mississippi State Employment Service and an employee, Hazel Cook. The Court stated in *Leatherman*, 113 S.Ct. at 1162, citing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 701, 98 S.Ct. 2018, 2041, 56 L.Ed.2d 611 (1978), "Municipalities do not enjoy absolute or qualified immunity from § 1983 suits."

Leatherman involved an action against a municipality, an important distinction considering Petitioner Wicks' allegation that the Fifth Circuit's decision is inconsistent with the *Leatherman* precedents. Wicks is in fact an action against the state and a state's employee. To be more specific, this Writ is in response to a Fifth Circuit's decision in reply to two motions contemporaneously filed by the separate defendant Cook, who enjoys qualified immunity.

Since *Leatherman* applies to municipalities which do not enjoy qualified immunity, the Fifth Circuit's decision can not be contrary to precedents set forth in said case as alleged by Wicks.

Indeed, this distinction is recognized by this Court in *Leatherman* when stating:

> First, respondents claim that municipalities' freedom from respondent superior liability, necessarily includes immunity from suit. In this sense, respondents assert, municipalities are no different from state or local officials sued in their individual capacity. . .
>
> This argument wrongly equates freedom from liability with immunity from suit.

Id. at 1162.

The Fifth Circuit's pleading standards are in harmony with this Court's ruling in *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982). In *Harlow* the court stated that:

> On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold question is resolved, discovery should not be allowed.

Harlow, 73 L.Ed.2d at 411.

The *Harlow* decision was reaffirmed in *Siegert, supra*, and therefore the Court of Appeal's decision is in line with this court's precedent.

The distinction between *Leatherman* (Municipality with no immunity) and *Wicks* (individual with qualified immunity) is obvious in light of this courts statement that: "The entitlement (qualified immunity) is an *immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 86 L.Ed.2d 411, 105 S.Ct. 2806 (1985).

III. THE INSISTENCE THAT A PLAINTIFF PLEAD MORE THAN CONCLUSIONS WAS RECENTLY REAFFIRMED BY THE FIFTH CIRCUIT IN A MODIFIED VERSION AS ARTICULATED IN *SCHULTEA v. WOOD*, 47 F.3d 1427 (5th Cir. 1995).

The "heightened pleading" is the balancing act pitting a plaintiff's rights to challenge government action against public officials' rights to be free of the difficulties of the discovery process. This balancing act is best represented by the requirements of the Fifth Circuit as represented by its decision in Wicks and subsequently modified in *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995).

On March 9, 1995, the Fifth Circuit en banc revisited its "heightened pleading" standard in *Schultea*, stating:

> We stand by our insistence that complaints plead more than conclusions, and that a plaintiff can, at the pleading stage, be required to engage the affirmative defense of qualified immunity when invoked. However, we will no longer insist that plaintiff fully anticipate the defense in his complaint at the risk of dismissal under Rule 12.

Id. at 1430.

The Court chose to no longer rely on the particularity requirements of Rule 9 of the Fed. R. Civ. P., but instead chose to require a reply, pursuant to Rule 7(a), to an answer raising the qualified immunity defense in his complaint.

As stated by the Court the ultimate outcome of a confrontation between Rule 9(b) and qualified immunity no longer need be decided.

The district court is required to insist that a plaintiff suing a public official under § 1983 file a short and plain statement of his complaint, a statement that rests on more than conclusions alone.

Once the affirmative defense of qualified immunity is raised, the Court may, on the official's motion or on its own, require the plaintiff to reply to that defense in detail.

The district court may ban discovery at this threshold pleading stage and may limit any necessary discovery to the defense of qualified immunity.

Wicks need only to follow the direction of the Circuit Court and taking advantage of the Court's directives, amend his pleadings making a plain and short statement that rests on more than conclusions. This solution appears not to be overly oppressive to Wicks. A Writ of Certiorari to this Court when such a simple solution is available seems to be an excessive measure.

IV. ACTIONS BASED ON 42 U.S.C. § 1983 CHARGING RACIAL DISCRIMINATION REQUIRE THE ALLEGATION OF SPECIFIC FACTS.

Petitioner complains that the Fifth Circuit's holding cannot be reconciled with this Court's precedents as to how a racial discrimination case may be proved. Petition for Certiorari at 5. Wicks cites as authority *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 240 (1981); *McDonell-Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *St. Mary's Honor Center v. Hicks*, 509 U.S. ——, 125 L.Ed.2d 407 (1993). The cases cited consist of employers who do not enjoy qualified immunity.

This Court has historically recognized that public officials require qualified immunity to protect them from undue interference with their duties and threats of liability.

In *Mitchell v. Forsyth* the court stated:

> Harlow thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essential legal question whether the conduct of which the plaintiff complains violated clearly established law.

472 U.S. 511, 526, 86 L.Ed.2d 411, 105 S. Ct. 2806 (1985).

The key phrase is "conduct of which plaintiff complains." It is obvious that when pleading a case of discrimination against one who enjoys qualified immunity, it must be taken a step further to adhere to the directives in *Harlow, supra.*

The Fifth Circuit has not negated a method for proving discrimination as claimed by Wicks. The pleadings standard which requires the specific "conduct" to be plead is not unlike pleading any other case against a public official. To lessen the disruptive effect that a volume of litigation would have on public officials and the resulting effect on their duties, a certain allegation of conduct must be plead.

The Circuit Court in an expansive reading of the complaint found that Wicks' allegations fail to suggest how Cook violated his clearly-established first amendment rights. That it appeared to be nothing more than an attempt to redress a personal grievance, a claim not generally actionable against a public employer, and made only broad and wholly conclusionary allegations that Cook discriminated against him on the basis of race. *Wicks, supra,* at 995, 996.

The complaint of the petitioner is totally void of the "conduct" of Cook which establishes a violation of right.

CONCLUSION

The Court has indeed "been over most of this ground before," and Respondents submit there is not need to do so again. The Petitioner has an ample remedy. The case has been remanded to the District Court with directions to allow the Petitioner to amend his pleadings and further the court has outlined the areas that need to be amended.

The Fifth Circuit ever cognizant of the need to improve and develop a better procedure to even the balancing act

required when two substantive rights collide, has changed its required pleading standard; thus, has achieved a very workable alternative. This new standard gives equal attention to the conflicting rights of both parties. Accordingly, for the reasons set forth in this brief, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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